

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>GERALD KINSER</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>TOPEKA TREE CARE, INC.</b>	)	
Respondent	)	Docket No. 1,014,332
	)	
AND	)	
	)	
<b>LIBERTY INS. CORP.</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent requested review of the April 13, 2006 Award by Administrative Law Judge (ALJ) Bryce D. Benedict. The Board heard oral argument on July 11, 2006.

**APPEARANCES**

Jeff K. Cooper, of Topeka, Kansas, appeared for the claimant. James K. Blickhan, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

The ALJ found that the claimant suffered two “relatively minor”<sup>1</sup> yet compensable work accidents<sup>2</sup> which have left claimant with a physical and psychological impairment. The ALJ then awarded claimant a 6 percent permanent partial impairment to the upper extremity along with a 32.5 percent psychiatric whole person functional impairment, both

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<sup>1</sup> ALJ Award (Apr. 13, 2006) at 2.

<sup>2</sup> The first accident occurred May 21, 2003 and the second occurred June 3, 2003.

as a result of the accident. When the two impairment ratings are properly converted and combined, as provided by the *Guides*<sup>3</sup>, the result is a 37 percent whole body impairment. The ALJ also found claimant's average weekly wage to be \$400.00 based upon claimant's testimony that he was expected to work 40 hours per week and was paid \$10 per hour.

The respondent requests review of that portion of the Award that grants claimant a permanent impairment (and thus money) for his psychiatric condition. Respondent contends that claimant has a history of psychiatric problems and treatment dating back to 2000, and that it is more likely than not that whatever his present condition, his diagnosis and resulting psychiatric impairment are attributable to that preexisting condition. Respondent also takes issue with Dr. Bickelhaupt's use of the 2<sup>nd</sup> edition of the *Guides* over the 4<sup>th</sup> edition, as required by K.S.A. 44-510e(a) and suggests that Dr. Bickelhaupt's opinions should be disregarded.

Finally, respondent also contends that the claimant's average weekly wage should be \$247.40, as evidenced by his wage statement entered into evidence. That record demonstrates that claimant certainly was paid \$10 per hour, but rarely worked a 40 hour work week in the 26 week period before his accidents.

Claimant requests that the ALJ's conclusions either be affirmed in all respects or that the Award be modified to increase the claimant's work disability to reflect a 68 percent whole body impairment, giving full effect to the opinions of Dr. Bickelhaupt, who testified that all of claimant's 65 percent psychiatric impairment is attributable to his work-related injuries. Claimant also asks that future medical be awarded by appointing Dr. Dana Carver as the authorized treating physician, including referrals for ongoing psychiatric treatment.

The issues to be resolved in this appeal are as follows:

1. The nature and extent of claimant's permanent impairment, both physical and psychological, attributable to his work-related accident(s);
2. Whether claimant is entitled to the designation of a physician for his ongoing psychological and/or shoulder complaints; and
3. Claimant's average weekly wage.

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<sup>3</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4<sup>th</sup> ed.). All references are to the 4<sup>th</sup> ed. of the *Guides* unless otherwise noted.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The Board finds that the ALJ's Award sets out findings of fact and conclusions of law that are detailed, accurate, and supported by the record. The Board further finds that it is not necessary to repeat those findings and conclusions in this order. Therefore, the Board adopts the ALJ's findings and conclusions as its own as if specifically set forth herein.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.<sup>4</sup> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."<sup>5</sup>

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.<sup>6</sup>

Here, the ALJ had to determine the nature and extent of claimant's permanent impairment of both his orthopaedic injury to his left shoulder and his claimed psychological impairment. As to the orthopaedic injury, the ALJ was persuaded by the opinions expressed by Dr. Phillip Baker, a physician retained by respondent to provide an evaluation, over those expressed by Dr. Delgado. Dr. Baker examined claimant on two occasions, the first time on September 7, 2004 and the second on December 8, 2004. He found no crepitus in the shoulder and following an EMG, no nerve damage was identified. He began to suspect that claimant may have been magnifying his symptoms because even a year after the injury, claimant appeared for his evaluation with his left arm in a sling. Dr. Baker offered no diagnosis as most of his findings were normal. He ultimately assigned a 6 percent permanent partial impairment to the left upper extremity due to claimant's limited loss of range of motion in the left shoulder based upon the 4<sup>th</sup> edition of the *Guides*.

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<sup>4</sup> K.S.A. 44-501(a).

<sup>5</sup> K.S.A. 44-508(g).

<sup>6</sup> *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 (1991), *rev. denied* 249 Kan. 778 (1991).

In contrast to Dr. Baker's testimony is that offered by Dr. Sergio Delgado, a physician retained by claimant's counsel. Dr. Delgado examined claimant on March 11, 2004 and diagnosed an impingement syndrome of the left shoulder along with bicipital tendinitis and acromioclavicular degeneration.<sup>7</sup> Upon cross-examination, the physician conceded claimant had a nearly normal range of motion in his left shoulder, normal reflexes and a normal neurological examination. Nonetheless, Dr. Delgado assigned a 15 percent permanent partial impairment to the left shoulder, based upon the 4<sup>th</sup> edition of the *Guides*, for residual mild crepitation and the loss of range of motion. Dr. Delgado attributes this permanent impairment to both accidents as he could not differentiate one injury from another.

The ALJ was more persuaded by Dr. Baker's opinions and awarded claimant a 6 percent to the left upper extremity at the level of the shoulder. He reasoned "[w]hatever crepitation found by Dr. Delgado was no longer present when the [c]laimant was later twice examined by Dr. Baker. In addition Dr. Delgado, unlike Dr. Baker, did not assess the [c]laimant's passive range of motion, but relied solely upon what the [c]laimant demonstrated it to be."<sup>8</sup>

The Board has considered the ALJ's reasoning along with the parties' arguments and their evidence and agrees with the ALJ's finding. The ALJ's assignment of a 6 percent permanent partial impairment to the left shoulder is affirmed.

Turning now to the psychiatric component of claimant's claim, the ALJ believed claimant had a preexisting psychological impairment "but that as a direct result of the accident his condition has significantly worsened."<sup>9</sup> He went on to state that "[t]he Court does not find persuasive Dr. Miller's conclusions that all of the [c]laimant's current impairment was preexisting, and neither does it find persuasive Dr. Bickelhaupt's conclusions that all of the [c]laimant's current impairment is attributable to the work accident. The truth lies somewhere in between, but neither doctor did a satisfactory job of investigating this."<sup>10</sup> Thus, the ALJ averaged Dr. Miller's 0 percent and Dr. Bickelhaupt's 65 percent and assigned a 32.5 percent functional impairment attributable to the psychological aspect of claimant's injury.

The Board has carefully reviewed the evidence and finds the ALJ's conclusions as to the claimant's psychiatric condition should be affirmed. While it is true claimant had an earlier bout with psychiatric problems along with some limited treatment, the records

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<sup>7</sup> Delgado Depo. at 8.

<sup>8</sup> ALJ Award (Apr. 13, 2006) at 3.

<sup>9</sup> *Id.* at 5.

<sup>10</sup> *Id.* (emphasis added)

indicate there was also a period of years during which he was able to successfully obtain and maintain employment with this respondent. Although there is no clear cut point in time when claimant was declared to be “cured” or relieved of his psychiatric problems, the fact that he steadily worked for respondent until his accidents suggests that whatever his problems, they lessened, or became less severe or debilitating sometime after 2000 and before he was hired by this respondent. And although the accidents described in this claim were, as the Judge noted, “relatively minor”, the ALJ was persuaded, as is the Board, that those injuries were significant enough to lead to the re-emergence of claimant’s psychiatric problems, including depression and a pain disorder. The Board finds the claimant’s current psychiatric problem is directly traceable to his physical injuries from his work-related accidents.

While it is true that Dr. Bickelhaupt originally indicated that he understood claimant had no preexisting psychiatric problems, upon presentation of claimant’s earlier psychiatric records, including Dr. Bickelhaupt’s evaluation of claimant, he remained steadfast in his opinion.

Accordingly, the Board agrees with the ALJ that claimant’s permanent partial impairment due to his psychiatric complaints is somewhere in between the opinions of Drs. Miller and Bickelhaupt and therefore, the Board affirms the ALJ’s finding of 32.5 percent as well as the combined impairment of 37 percent whole body permanent partial impairment.

Although respondent argues that Dr. Bickelhaupt’s opinion should be disregarded because he used the 2<sup>nd</sup> edition of the *Guides*, the Board has rejected that argument in the past and does so here.<sup>11</sup> The Act permits other methods for rating impairment when that impairment is not contained in the *Guides*.<sup>12</sup> Because the 4<sup>th</sup> edition of the *Guides* does not contain a numerical rating for psychological impairments, Dr. Bickelhaupt was free to use another edition of the *Guides*, or any other scholarly publication or medically accepted method to rate claimant.

As for average weekly wage, according to claimant he was paid \$10 per hour and was expected to work 40 hours per week. However, the wage statement provided by respondent shows that in the 26 week period before his injury, claimant worked just 2 weeks in excess of 40 hours. The balance of the 24 weeks indicate claimant worked as little as 8 hours, but no more than 38 hours in any given week. When added together and divided by the appropriate number of weeks, the average weekly wage was, according to respondent, \$247.40. But no one disputes claimant’s testimony that he was *expected* to

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<sup>11</sup> *Bradford v. Manhattan Mercury/Seaton Publishing Co.*, No. 210,583, 2000 WL 973232 (Kan. WCAB June 19, 2000).

<sup>12</sup> K.S.A. 44-510e(a).

work 40 hours per week. Rather, respondent argues that claimant's actual wages for that 26 week period should be used. And as a result, his weekly wage should be \$247.40 rather than the \$400 found by the ALJ.

K.S.A. 44-511(b)(4)(B) provides that the computation of the average gross weekly wage is determined by multiplying the daily money rate by the number of days and half days that the employee usually and regularly worked or was expected to work. In *Tovar*,<sup>13</sup> it was stated:

"If an employee is told that he is to keep Saturdays open and available for work, it appears to us that this is tantamount to a directive that he is expected to work each Saturday. Whether he does or not is largely irrelevant because the statute bases compensation on the number of days per week an employee is 'expected' to work, not the number of days an employee is guaranteed to work or actually does work."

Here, the claimant indicates he was expected to work 40 hours per week but for whatever reason, rarely did so. There was no explanation offered as to why claimant would expect to work 40 hours per week but fail to do so on a regular basis. Under *Tovar*, the Board is persuaded that claimant's average weekly wage should be based upon the 40 hour work week. Accordingly, the ALJ's finding as to wage is affirmed and claimant's average weekly wage is found to be \$400 per week.

Although the ALJ did not designate a treating physician, claimant requested that one be appointed and the Board agrees it is appropriate to do so. Claimant is in need of ongoing psychiatric treatment as well as treatment for his shoulder complaints. Accordingly, respondent shall designate a physician to oversee claimant's treatment, including his psychiatric treatment, for his work-related injuries.

All other findings and conclusions contained within the ALJ's Award are affirmed to the extent they are not modified herein.

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<sup>13</sup> *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 (1991), rev. denied 279 Kan. 778 (1991).

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated April 13, 2006, is affirmed in part and modified in part, so as to award claimant ongoing medical treatment with a physician to be designated by respondent as ordered above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of August, 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

**DISSENTING OPINION**

The undersigned Board Member respectfully dissents from the majority's opinion. Based upon the evidence contained within the record, this member would find that Dr. Bickelhaupt's opinions are unpersuasive and lack credibility. Dr. Bickelhaupt, who saw claimant at his attorney's request, found claimant to have a 65 percent permanent partial impairment on a psychological basis. Dr. Bickelhaupt's opinion was partially based on his understanding that claimant never had depression or psychological problems before the shoulder injuries. However, on cross examination, Dr. Bickelhaupt admitted that he was not given the claimant's prior psychological records. In fact, he was unaware that he had seen claimant in 2000, following a head injury suffered by claimant at which time Dr. Bickelhaupt diagnosed claimant with depression and anxiety. Additionally Dr. Bickelhaupt did not have records showing claimant was diagnosed with depression and was placed on anti-depressant medication, even before the 2000 head injury. The records also indicated claimant had a history of alcoholism, a learning disability, and anti-social problems with his family and friends, all of which Dr. Bickelhaupt was unaware.

Dr. Miller, respondent's expert, did have the prior records and spent almost an entire day testing claimant. Dr Miller diagnosed claimant with depression and psychological injuries, all of which preexisted claimant's injuries with respondent.

This Board member would find the opinion of Dr. Bickelhaupt to lack credibility, and would, instead, adopt the opinion of Dr. Miller. Accordingly, this member would find that claimant has failed to meet his burden of proof that the psychological component of his claim arose out of and in the course of his employment. This Board member would deny the psychiatric component of claimant's claim.

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BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant  
James K. Blickhan, Attorney for Respondent and its Insurance Carrier